Court, U.S.
FEB 16 2010
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No. 09-842

In The Supreme Court of the United States

BARBARA HUSS and RODNEY HUSS,

Petitioners,

v.

JOHN OVERTON GAYDEN, M.D., and MEMPHIS OBSTETRICS AND GYNECOLOGICAL ASSOCIATION P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners contend that a panel of the Fifth Circuit Court of Appeals misapplied the abuse of discretion standard of review when the panel reversed a lower court ruling excluding expert evidence. Assuming *arguendo* that Petitioners are correct, is there a compelling reason for this Court to review the alleged error when it is not egregious and is not likely to be repeated?

2. Given that each circuit court of appeals states that it applies the abuse of discretion standard when reviewing issues relating to expert evidence, is there a circuit split concerning the scope of appellate review that requires this Court to exercise its supervisory power?

3. Does the Fifth Circuit panel's application of the abuse of discretion standard of review for expert opinion testimony represent a departure from settled precedent?

RULE 29.6 STATEMENT

All parties to the proceeding are included in the caption and on the cover. Respondents are an individual and a privately owned professional corporation ("P.C."). No party is a parent or publicly held company owning 10% or more of a corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	3
I. GIVEN THE UNIQUE, CASE-SPECIFIC CIRCUMSTANCES THAT UNDERLIE THE OPINION AT ISSUE, THE FIFTH CIRCUIT COURT OF APPEALS' ALLEGED MISAPPLICATION OF THE ABUSE OF DISCRETION STANDARD OF REVIEW DOES NOT WARRANT AN EXERCISE OF THIS COURT'S SUPERVISORY POWER	4
II. PETITIONERS' ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW IS UNSUCCESSFUL	10

TABLE OF CONTENTS – Continued

Page

III. PETITIONERS' ATTEMPT TO PORTRAY THE PANEL OPINION AS A ROGUE DECISION ABOUT EXPERT TESTIMONY FINDS NO SUPPORT IN THIS COURT'S PRECEDENT WHICH ALREADY HAS SETTLED THE STANDARD OF REVIEW ISSUE..... 17

CONCLUSION..... 19

TABLE OF AUTHORITIES

Page

CASES

Billiot v. Puckett, 135 F.3d 311 (5th Cir. 1998).....9

Bland v. Verizon Wireless, L.L.C., 538 F.3d 893 (8th Cir. 2008) 16

Compania Administradora de Recuperacion v. Titan, 533 F.3d 555 (7th Cir. 2008).....14, 15

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).....*passim*

Gen Elec. Co. v. Joiner, 522 U.S. 136 (1997) 7, 10

Huss v. Gayden (*Huss I*), 465 F.3d 201 (5th Cir. 2006).....3

Huss v. Gayden (*Huss II*), 2006 WL 5013195 (5th Cir. Dec. 27, 2006) (per curiam).....3

Huss v. Gayden (*Huss III*), 508 F.3d 240 (5th Cir. 2007).....3

Huss v. Gayden (*Huss IV*), 991 So.2d 162 (Miss. 2008).....3

Huss v. Gayden (*Huss V*), 571 F.3d 442 (5th Cir. 2009).....1, 3

Hyatt v. Doll, 576 F.3d 1246 (Fed. Cir. 2009) 16

In re Prempro Prods. Liab. Litig., 586 F.3d 547 (8th Cir. 2009) 16

In re Scrap Metal Antitrust Litig., 527 F.3d 517 (6th Cir. 2008) 16

James v. Harris County, 577 F.3d 612 (5th Cir. 2009).....10

TABLE OF AUTHORITIES – Continued

Page

Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993).....16

Kannankeril v. Terminix Intern., Inc., 128 F.3d 802 (3rd Cir. 1997).....15

Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys., 428 F.3d 706 (7th Cir. 2005).....12

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998).....18

Lake Michigan Contractors, Inc. v. Manitowac Co., Inc., 225 F.Supp.2d 791 (W.D. Mich. 2002).....11

Lewis v. Citgo Petroleum Corp., 561 F.3d 698 (7th Cir. 2009).....12, 13

Moore v. Ashland Chem. Inc., 151 F.3d 269 (5th Cir. 1998).....8, 18

Rios v. City of Del Rio, Tex., 444 F.3d 417 (5th Cir. 2006).....9

Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2nd Cir. 2005).....15

Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224 (5th Cir. 2007).....10

Tanner v. Westbrook, 174 F.3d 542 (5th Cir. 1999).....8

U.S. v. Alatorre, 222 F.3d 1098 (9th Cir. 2000).....11

U.S. v. Allen, Jr., 269 F.3d 842 (7th Cir. 2001).....14

U.S. v. Day, 524 F.3d 1361 (D.C. Cir. 2008).....16

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Frazier, 387 F.3d 1244 (11th Cir. 2004).....16

U.S. v. Gray, 410 F.3d 338 (7th Cir. 2005).....14, 15

U.S. v. Hall, 93 F.3d 1337 (7th Cir. 1996).....13

U.S. v. Pansier, 576 F.3d 726 (7th Cir. 2008).....13

U.S. v. Wofford, 560 F.3d 341 (5th Cir. 2009).....10

Winters v. Fru-Con, Inc., 498 F.3d 734 (7th Cir. 2007).....13

OTHER REFERENCES

FED. R. EVID. 104(a).....11

FED. R. EVID. 702 .....12, 13

FED. R. EVID. 703 12

SUP. CT. R. 10.....4, 5

OPINIONS BELOW

The Fifth Circuit opinion at issue reversing and remanding a judgment for Petitioners is reported at *Huss v. Gayden*, 571 F.3d 442 (2009), and reprinted at Pet. App. A1-A53. The Northern District of Mississippi opinion declining to set aside the jury verdict is not reported in an official or unofficial source. That opinion is reprinted at Pet. App. A53-A68. Excerpts of the transcript of trial proceedings are reprinted at Pet. App. A70-A74. The Fifth Circuit order denying panel and *en banc* rehearing and the related dissenting opinions are reported at *Huss v. Gayden*, 585 F.3d 823 (2009), and reprinted at Pet. App. A75-A99.

STATEMENT OF THE CASE

Petitioners ask this Court to determine whether a panel of the Fifth Circuit Court of Appeals misapplied the abuse of discretion standard of review. The Fifth Circuit ordered a new trial of a medical malpractice case because "the exclusion of [the defendants' expert's] opinion testimony was an abuse of discretion." Pet. 8. Petitioners contend that the Fifth Circuit decision lowers the bar for the admission of testimony from defense experts and highlights a split in the circuit courts concerning the scope of review of trial court *Daubert* rulings. Respondents respectfully disagree and ask the Court to deny the petition because there is no compelling reason for the Court to intervene.

Petitioners Barbara and Rodney Huss allege that defendant Dr. John Gayden's purported negligent prescription and administration of Terbutaline to Mrs. Huss while she was pregnant caused her to develop peripartum cardiomyopathy. Pet. 4. At trial, Petitioners' expert, Dr. Frederick Carlton, Jr., testified that Terbutaline caused Mrs. Huss's cardiomyopathy. Pet. 4. Respondents offered testimony from their expert, Dr. Michael Reddix, to rebut Dr. Carlton's causation opinion. Without objection from the Petitioners, Dr. Reddix testified that cardiomyopathy is idiopathic, meaning that its cause is unknown. Pet. App. A11. Dr. Reddix was prepared to explain that the medical literature on which Dr. Carlton's causation opinion rested was unreliable, in no small part because one of the studies stated that, "[c]aution should be exercised in understanding that the case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." Pet. App. A33 (emphasis in original). Following objection from Petitioners and a brief hearing outside of the jury's presence, the magistrate judge ruled that Dr. Reddix's proffered testimony was "outside his area of expertise" and excluded the testimony, leaving Respondents with no means to rebut Dr. Carlton's causation opinion. Pet. App. A71. The trial ended with a general verdict for Petitioners.

Respondents appealed the judgment for the Petitioners, asserting multiple grounds for relief. A Fifth Circuit panel initially held that the applicable Mississippi statute of limitations barred the Petitioners'

claims. *Huss v. Gayden* (*Huss I*), 465 F.3d 201, 208-09 (5th Cir. 2006). A majority of active Fifth Circuit judges then voted to deny Petitioners' request for rehearing *en banc*, *Huss v. Gayden* (*Huss II*), 2006 WL 5013195, at *1 (5th Cir. Dec. 27, 2006) (per curiam); however, a Fifth Circuit panel granted Petitioners' request for rehearing. The panel certified the question regarding the statute of limitations issue to the Mississippi Supreme Court. *Huss v. Gayden* (*Huss III*), 508 F.3d 240, 245-48 (5th Cir. 2007). After the Mississippi Supreme Court held that the limitations defense could not be decided as a matter of law, *Huss v. Gayden* (*Huss IV*), 991 So.2d 162, 165 (Miss. 2008), the Fifth Circuit panel turned to the remaining issues that Respondents raised on appeal. *Huss v. Gayden* (*Huss V*), 571 F.3d 442 (5th Cir. 2009). First among them was the expert evidentiary issue that prompted this petition. Finding that the magistrate judge abused his discretion when he excluded Respondents' rebuttal expert testimony, the Fifth Circuit panel reversed the judgment for the Petitioners and remanded the case for a new trial. Pet. App. A1, A25. This petition followed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Respondents John Overton Gayden, M.D., and Memphis Obstetrics and Gynecological Association, P.C., oppose Petitioners' request for a writ of certiorari and respectfully ask the Court to deny the

petition. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." SUP. CT. R. 10. Petitioners have not offered the Court sufficiently compelling reasons to grant their petition. If there is error in the Circuit Court's opinion, it is neither significant nor likely to be repeated, and the circuit split that Petitioners portray is the product of creative license, not reported case law. At worst, the Circuit Court arguably misapplied a settled, properly stated rule of law. Under these circumstances, there is no reason for this Court to intervene.

I. GIVEN THE UNIQUE, CASE-SPECIFIC CIRCUMSTANCES THAT UNDERLIE THE OPINION AT ISSUE, THE FIFTH CIRCUIT COURT OF APPEALS' ALLEGED MISAPPLICATION OF THE ABUSE OF DISCRETION STANDARD OF REVIEW DOES NOT WARRANT AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

This Court rarely grants a petition for writ of certiorari when the asserted error consists of misapplication of a properly stated rule of law. SUP. CT. R. 10. This case does not provide an exception to the rule. Petitioners complain that the Fifth Circuit Court of Appeals "turn[ed] the abuse of discretion standard on its head" when it reversed the magistrate judge's ruling regarding the exclusion of expert testimony in this medical malpractice case. Pet. 3. Respondents respectfully disagree with Petitioners' contention that the court of appeals

misapplied the standard of review, but even if it did, the alleged error is neither so egregious nor so likely to be repeated that it calls for this Court to exercise its supervisory power. SUP. CT. R. 10.

The Circuit Court's conclusion that the magistrate judge abused his discretion in excluding expert evidence is inextricably tied to the unique circumstances of this medical malpractice case. Petitioners' claims rise and fall on their ability to prove that Barbara Huss developed peripartum cardiomyopathy because she took the drug Terbutaline during her pregnancy. General and specific causation was the crux of the matter; proffered testimony from defendants' causation expert, Dr. Reddix, triggered this petition for writ of certiorari.

Dr. Reddix testified without objection from the Petitioners about general causation, stating that cardiomyopathy is idiopathic, meaning that "the etiology or medical cause of the condition is unknown." Pet. 5; Pet. App. A11. Dr. Reddix's opinion was consistent with testimony from Mrs. Huss's cardiologist, Dr. Gary Murray, who acknowledged that cardiomyopathy is idiopathic. *Id.* at A11. Following Dr. Reddix's general causation testimony, the magistrate judge sustained the Petitioners' objection to questions that defense counsel posed to Dr. Reddix designed to elicit his opinion about whether Terbutaline "caused or contributed to the cardiomyopathy suffered by Barbara Huss." Pet. 5-6. In reviewing the magistrate judge's ruling, the Circuit Court observed that, "[t]he main purpose of Dr. Reddix's opinion was to rebut an

untenable conclusion" that the Petitioners' expert, Dr. Carlton, offered. Pet. App. A26. Dr. Carlton "testified that Terbutaline is known in the medical community to cause cardiomyopathy." *Id.* at A11. The Circuit panel found that, "Dr. Reddix's knowledge qualified him to tell the jury that Dr. Carlton's inferential leap was unsupported by medical literature, and that in his judgment, Barbara's peripartum cardiomyopathy was idiopathic." *Id.* at A26-A27.[1] The Circuit Court concluded, "We believe that the exclusion of Dr. Reddix's opinion testimony was an abuse of discretion." *Id.* at A25.

The panel was troubled by the fact that the magistrate judge allowed Petitioners' expert Dr. Frederick Carlton, Jr., "who is a toxicologist, not a cardiologist," to testify that Terbutaline caused Mrs. Huss's cardiomyopathy "because he could not identify or think of any other reason that Barbara would develop cardiomyopathy." *Id.* at A26. The panel was equally concerned that Dr. Carlton based his specific causation opinion on medical literature concerning studies of very few subjects with statistically insignificant results. *Id.* at A23, A25-A26. In section VI of the opinion below, which is not part of the panel's holding, Judge DeMoss went so far as to recommend

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[1] Throughout their petition, Mr. and Mrs. Huss refer to the Fifth Circuit opinion at issue as the "third panel decision." Although the opinion at issue is the third from the Fifth Circuit in this case, it is the first opinion that addresses the expert evidence issue.

that on remand, the magistrate judge entertain a motion for judgment as a matter of law because Petitioners' expert's causation opinions (both general and specific) "lacked an adequate basis in science or fact," constituted "unjustified conclusions . . . drawn from scant data and chance occurrences," offered "a scientifically untenable thesis," and, most importantly, contradicted the disclaimer in the study upon which the expert's testimony rested that, "[c]aution should be exercised in understanding that the case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." *Id.* at A32-A34 (emphasis in original). Citing this Court's opinion in *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), Judge DeMoss explained, "[i]t is axiomatic that causation testimony is inadmissible if an expert relies on studies or publications, the authors of which were themselves unwilling to conclude that causation had been proven." Pet. App. A35. Writing that "[c]ourts must be arbiters of truth, not junk science and guesswork," Judge DeMoss stated in dicta that the magistrate judge should have excluded Dr. Carlton's speculative opinions and entered judgment as a matter of law for the defendants; however, "[g]iven the procedural posture of this case, only a new trial is available." *Id.* at A36-A37.

In this procedural posture then, on a record that contained Dr. Carlton's unreliable causation testimony, the Circuit Court found that "there were sufficient indicia in this case that Dr. Reddix would

provide a reliable opinion in rebuttal to Dr. Carlton's opinion." The Circuit Court held that the magistrate judge abused his discretion when he refused to allow Dr. Reddix to respond to defense counsel's questions because the magistrate "missed the purpose for which defendants sought to elicit Dr. Reddix's opinion." *Id.* at A27. In her dissent to the order denying Petitioners' request for *en banc* rehearing, one of the Fifth Circuit judges described the panel's decision as "a true rarity in this circuit and every other." *Id.* at A98. It is, and that is precisely why the panel decision is unfit for review by this Court. The unique features of this litigation isolate any alleged error to the particular facts of this case.

If there is error in the Circuit Court's decision, it might best be described as a textbook case of bad facts making bad law, but the panel opinion does not even make binding law in the Fifth Circuit Court of Appeals. Judge Elrod pointed out in her dissenting opinion regarding *en banc* rehearing that the panel opinion is not binding because it conflicts with two prior Fifth Circuit opinions, *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), and *Moore v. Ashland Chem. Inc.*, 151 F.3d 269 (5th Cir. 1998).[2] "'[W]here two

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[2] *See Tanner v. Westbrook*, 174 F.3d 542, 548 (5th Cir. 1999) (holding that it is an abuse of discretion to admit testimony from an expert witness with "generalized medical knowledge" when an opinion on a specific issue requires "knowledge of a complicated, specialized medical subject matter"); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 277 (5th Cir. 1998) (holding that a district court is within its discretion in excluding expert testimony

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previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit.'" Pet. App. A98 (quoting *Rios v. City of Del Rio, Tex.*, 444 F.3d 417 (5th Cir. 2006)); *see also Billiot v. Puckett,* 135 F.3d 311, 316 (5th Cir. 1998) ("As a general rule, one panel may not overrule the decision of a prior panel, right or wrong, in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court."). To the extent that there is purported error in the Circuit Court's opinion, it is contained under the Fifth Circuit's rules of intra-circuit stare decisis, and the Fifth Circuit is capable of and equipped to reconcile alleged conflicts within its court in due course.

Given the unique circumstances that give rise to a fact-specific panel decision that does not appear to be binding in the Fifth Circuit Court of Appeals, this case provides no basis for this Court to make an exception to the general rule that it will not review an alleged misapplication of a properly stated rule of law. Respondents contend that the circuit courts of appeal should apply the abuse of discretion standard when reviewing expert evidence issues; the Fifth Circuit did just that. Petitioners simply are dissatisfied with the outcome of the appellate review. Their discontent does not provide a basis for this Court to intervene.

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on causation when too great of an "analytical gap" exists between the available data and the opinion proffered).

Respondents respectfully ask the Court to deny the petition for writ of certiorari.

II. PETITIONERS' ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW IS UNSUCCESSFUL.

The federal appellate courts uniformly apply this Court's rule that, "All evidentiary decisions are reviewed under an abuse-of-discretion standard." *Joiner*, 522 U.S. at 141. Petitioners erroneously suggest that the Fifth and Seventh Circuits apply a *de novo* standard of review when considering whether an expert is qualified to offer a particular opinion. Like all other circuits, the Fifth and Seventh Circuits review a district court's ruling on expert evidence for abuse of discretion.

Petitioners' argument that the Fifth Circuit departs from the norm begins with the self-defeating admission that, "[t]he 5th Circuit acknowledges that the admission or exclusion of expert testimony is reviewed for abuse of discretion." Pet. 12. This is correct: the Fifth Circuit applies the abuse of discretion standard for such reviews. *James v. Harris County*, 577 F.3d 612, 619 (5th Cir. 2009) ("We review a district court's rejection of expert testimony for abuse of discretion."); *see also U.S. v. Wofford*, 560 F.3d 341, 346 (5th Cir. 2009) ("We review the district court's decision to exclude expert testimony under an abuse of discretion standard."); *Smith v. Goodyear Tire &*

Rubber Co., 495 F.3d 224, 226 (5th Cir. 2007) ("The exclusion of expert testimony is reviewed for an abuse of discretion," and, "District courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous.").

Petitioners attempt to identify a divergence from precedent by noting that the Fifth Circuit, citing FED. R. EVID. 104(a), stated below that "[w]hether an individual is qualified to testify as an expert is a question of law." Pet. App. A20. Numerous courts conducting *Daubert* analysis have observed that their role as gatekeepers for expert evidence falls under the umbrella of Rule 104(a)'s requirement that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court. . . ." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.") (footnotes omitted); *see, e.g.*, *U.S. v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("The trial court, acting as gatekeeper, is required to assess, pursuant to Rule 104(a), whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will help the factfinder understand or decide a fact in issue.") (internal quotations omitted); *Lake Michigan*

Contractors, Inc. v. Manitowoc Co., Inc., 225 F.Supp.2d 791, 794 (W.D. Mich. 2002) ("[I]n determining whether to admit expert testimony, a trial court must act as a gatekeeper under Rule 104(a) and examine 'whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'") (quoting *Daubert*, 509 U.S. at 592). This threshold proposition does not alter the circuit courts' ultimate standard of review, and it did not here. The sentence upon which the Petitioners' fix in the *Huss* opinion – "[w]hether an individual is qualified to testify as an expert is a question of law" – is followed immediately by the statement, "However, we review the admission or exclusion of expert testimony for an abuse of discretion." Pet. App. A20. The Fifth Circuit's statement of the standard of review is consistent with *Joiner* and with every other circuit.

As for the Seventh Circuit, that court also reviews a district court's admission or exclusion of expert testimony on a particular matter for abuse of discretion. *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys.*, 428 F.3d 706, 712 (7th Cir. 2005) ("[W]e review for abuse of discretion the district court's [. . .] conclusions regarding the admissibility of expert testimony."). The court uses a two-step test for performing such review. First, the court reviews *de novo* whether the district court applied the correct legal standard in determining the admissibility of expert evidence, i.e., FED. R. EVID. 702 and 703 and the *Daubert* factors. 509 U.S. 579 (1993); *Lewis v.*

Citgo Petroleum Corp., 561 F.3d 698, 705 (7th Cir. 2009) ("[W]e review *de novo* whether the court employed the correct legal standard in reaching its admissibility decision."). Once satisfied that the district court followed the proper standard, the Seventh Circuit reviews "whether the court abused its discretion in its 'choice of factors [included] within that framework as well as [the district court's] ultimate conclusions regarding the admissibility of expert testimony.'" *Id.* (quoting *Winters v. Fru-Con Inc.*, 498 F.3d 734, 742 (7th Cir. 2007)); *see also U.S. v. Pansier*, 576 F.3d 726, 737-38 (7th Cir. 2008) ("We review *de novo* whether the court applied the legal framework required under Rule 702 and *Daubert,* and we review the court's decision to admit or exclude expert testimony for abuse of discretion."); *U.S. v. Hall,* 93 F.3d 1337, 1342 (7th Cir. 1996) (when reviewing a lower court ruling concerning the admissibility of scientific evidence, the circuit court reviews *de novo* whether the district court "properly followed" the *Daubert* framework; if the district court did so, the circuit court will overturn a ruling only if it was clearly erroneous). The Seventh Circuit uses a *de novo* standard only in evaluating whether the district court applied the correct legal test. The circuit court reviews all other matters, including whether an expert was qualified under that test to opine on a specific matter, under the abuse of discretion standard. *Lewis*, 561 F.3d at 705 ("Thus, we review the substance of the court's evidentiary decisions only for an abuse of discretion.").

Petitioners cite *U.S. v. Gray*, 410 F.3d 338 (7th Cir. 2005), and *Compania Administradora de Recuperacion v. Titan*, 533 F.3d 555 (7th Cir. 2008), for the proposition that the Seventh Circuit reviews district court rulings on an expert qualifications *de novo*. This is incorrect – the *Gray* and *Compania* opinions follow the Seventh Circuit's two-step process. In *Gray*, the court stated that its "review of whether [the witness in question] was properly qualified as an expert [was] *de novo*," while its review of "the decision to admit the testimony [was] for an abuse of discretion." 410 F.3d 338, 347 (7th Cir. 2005). Although perhaps awkwardly phrased, this statement of the law is accurate and in accord with the other circuits when viewed in context. *Gray* cites *U.S. v. Allen, Jr.*, 269 F.3d 842 (7th Cir. 2001), in discussing the standard of review for evidentiary rulings. *Gray*, 410 F.3d at 347. In *Allen, Jr.*, the Seventh Circuit articulated its two-step process clearly: "We review whether the trial court properly applied the *Daubert* framework *de novo*. [. . .] If we determine that the trial court properly applied the *Daubert* framework, we review the decision to admit or exclude expert testimony for abuse of discretion." 269 F.3d at 845. In light of the standard of review applied in *Allen, Jr.* and in all other Seventh Circuit cases, it is unmistakable that when the court in *Gray* stated that it reviewed *de novo* whether a witness was "properly qualified as an expert," it referred to whether the district court applied the proper standard, not to whether the district court applied that standard correctly. 410 F.3d at 347.

Petitioners' interpretation of *Compania* suffers from similar problems. *Compania* acknowledges that the Seventh Circuit reviews a district court's decision to admit or exclude expert testimony "for an abuse of discretion," 533 F.3d 555, 559 (7th Cir. 2008), and cites the correct but unusually worded standard of review announced in *Gray*. *Id.* As with *Gray*, when viewed in context, *Compania* is a correct statement of the law and is in accord with other circuits.

Thus, the standard of review concerning expert evidence is consistent among the circuit courts of appeals. Petitioners acknowledge that the First, Fourth, Ninth, and Tenth Circuits review a district court's evidentiary determinations for abuse of discretion. Pet. 11-12 ("The 1st, 4th, 9th and 10th Circuits clearly apply [. . .] the deferential abuse of discretion standard of review."). Moreover, Petitioners make no argument that the Second, Third, Sixth, Eighth, Eleventh, Federal, or District of Columbia Circuits applies a different standard. Such an argument would be fruitless because these circuit courts review a district court's ruling on expert testimony for abuse of discretion. *See, e.g., Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 253-54 (2nd Cir. 2005) ("A district court's decision as to how the reliability of expert testimony should be determined, as well as the ultimate decision as to whether that testimony is reliable, are reviewed for abuse of discretion."); *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802, 806 (3rd Cir. 1997) ("A district court's ruling on admissibility of expert testimony is reviewed for

abuse of discretion."); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008) ("We review for abuse of discretion the district court's determination to admit or exclude expert testimony, recognizing, of course, that such review calls for deference to the district court's decision.") (internal citations omitted); *In re Prempro Prods. Liab. Litig.*, 586 F.3d 547, 565 (8th Cir. 2009) ("'[A]bsent a clear and prejudicial abuse of discretion,' we will not reverse a district court's determination on the admissibility of expert testimony.") (quoting *Bland v. Verizon Wireless, L.L.C.*, 538 F.3d 893, 896 (8th Cir. 2008)); *U.S. v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) ("We review for abuse of discretion the district court's decisions regarding the admissibility of expert testimony and the reliability of an expert opinion."); *Hyatt v. Doll*, 576 F.3d 1246, 1273 (Fed. Cir. 2009) ("[T]o the extent that district court evidentiary rulings apply the correct legal standard, we review them for abuse of discretion."); *U.S. v. Day*, 524 F.3d 1361, 1367 (D.C. Cir. 2008) ("A district court has broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when that discretion has been abused.") (quoting *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C. Cir. 1993) (internal quotations omitted)).

There is no circuit split. Consequently, Respondents respectfully ask the Court to deny the petition for writ petition.

III. PETITIONERS' ATTEMPT TO PORTRAY THE PANEL OPINION AS A ROGUE DECISION ABOUT EXPERT TESTIMONY FINDS NO SUPPORT IN THIS COURT'S PRECEDENT WHICH ALREADY HAS SETTLED THE STANDARD OF REVIEW ISSUE.

Petitioners' argument that the panel found "as a matter of law [that] a professional who is licensed to practice as a generalist for several years necessarily possesses knowledge to evaluate the soundness of published research and testify on complex issues in very specialized areas of his profession" is particularly perplexing. Pet. 17. At no point does the panel opinion suggest as "a rule of law" that "general medical school training of any licensed physician along with the treatment of patients in general primary care is sufficient to testify." *Id.* at 26. The panel's decision regarding the admissibility of Dr. Reddix's specific causation testimony was based on the particular facts of this case. The panel held that, "Dr. Reddix did not need to be board-certified in cardiology or toxicology to explain that the studies relied on by the Husses do not prove a causative relationship – especially given the very small number of patients in those studies." Pet. App. A25.

In holding that the magistrate judge's decision to exclude Dr. Reddix's specific causation testimony "was an abuse of discretion," the panel noted that, "[t]he *Daubert* standards are flexible, and the most important question is not whether one party's expert

is more qualified than the other's, but rather, whether an expert's testimony is reliable." *Id.* at A27. Far from reflecting a departure from settled standards for the admissibility of expert testimony, the panel's opinion is consistent with binding precedent. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1998) (*Daubert's* "gatekeeping inquiry must be 'tied to the facts' of a particular 'case' " because "[t]oo much depends upon the particular circumstances of the particular case at issue"); *Daubert*, 509 U.S. at 597 (district court must determine whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Moore*, 151 F.3d at 275 (holding that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" and noting that *Daubert* provides a flexible test).

In this case, the Circuit panel held that the magistrate judge abused his discretion in finding that the defendants' causation expert needed more than general medical knowledge to rebut the Petitioners' "expert" causation opinion, given the unreliable, unscientific studies on which the opinion was based. One of those studies contained the express disclaimer that its "case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." Pet. App. A33 (emphasis in original). It is difficult to imagine a more fact-specific analysis. Because the panel decision is not a departure from settled precedent concerning the

reliability of expert scientific opinions, it does not offer a compelling reason for this Court to weigh in.

CONCLUSION

Petitioners have presented no compelling reason for the Court to review the Court of Appeals' application of settled legal standards in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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